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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIO CESAR LOPEZ,

Defendant and Appellant.

B266294

(Los Angeles County
Super. Ct. No. TA136272)

Appeal from a judgment of the Superior Court of Los Angeles County, John T. Doyle, Judge. Affirmed as modified with directions.

Jerome J. Haig, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Julio Cesar Lopez (defendant) was convicted by a jury of two felonies. The first felony was fleeing a pursuing peace officer while driving recklessly (count 1). (Veh. Code, § 2800.2.) The second felony was fleeing a pursuing peace officer's motor vehicle while driving recklessly and against traffic (count 2). (Veh. Code, § 2800.4.) Defendant admitted he had previously sustained two prior felony convictions for deadly weapon assault (Pen. Code, § 245, subd. (a)(1))¹ and vandalism. (§ 594.) The vandalism was committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(A).) The trial court imposed a consecutive state prison sentence of three years (count 1) and eight months (count 2). We agree with defendant that the trial court erred in failing to stay defendant's count 2 sentence under section 654, subdivision (a). We modify the judgment to impose a stayed three-year sentence on count 2. We also modify the judgment with respect to assessments and fees. We affirm the judgment as modified with directions.

II. THE EVIDENCE

California Highway Patrol Officer James Final attempted a traffic stop after noticing defendant's motorcycle did not have a license plate. Defendant led Officer Final on a high speed chase. During the chase, defendant ran red lights and briefly drove northbound in the southbound lanes of traffic—for an eighth to a quarter mile. When Officer Final lost sight of defendant, a sheriff's helicopter continued the pursuit. Defendant was apprehended after abandoning his motorcycle and hiding under an abutment. Officer Final interviewed defendant. Defendant said he ran because he had a suspended license and, possibly, he also had outstanding warrants.

Defendant testified he was listening to loud music through ear phones and had no idea he was being pursued. According to defendant, a car had clipped his motorcycle causing him to swerve into an oncoming traffic lane. And he panicked because he thought he was in danger. But defendant testified he drove at a safe speed.

¹ Further statutory references are to the Penal Code except where otherwise noted.

III. DISCUSSION

A. Section 654, Subdivision (a)

Section 654, subdivision (a) states in part, “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” Section 654, subdivision (a) prohibits multiple punishments for the same act or indivisible course of conduct, not multiple convictions. (*People v. Infante* (2014) 58 Cal.4th 688, 695; *People v. Correa* (2012) 54 Cal.4th 331, 336; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) As our Supreme Court has explained: “It is defendant’s intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] We have traditionally observed that if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ [Citation.]” (*People v. Harrison, supra*, 48 Cal.3d at p. 335; accord, *People v. Hicks* (1993) 6 Cal.4th 784, 789.)

Whether section 654, subdivision (a) applies in a particular case is a factual question for the trial court. (*People v. Capistrano* (2014) 59 Cal.4th 830, 886; *People v. Coleman* (1989) 48 Cal.3d 112, 162.) Our Supreme Court has held: “[to permit multiple punishments,] there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he [or she] was sentenced. [Citation.]’ [Citation.]” (*Ibid*; accord, *People v. Capistrano, supra*, 59 Cal.4th at p. 886.) We review for substantial evidence the trial court’s implied factual finding defendant had more than one intent and objective when he committed the present crimes. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. Coleman, supra*, 48 Cal.3d at p. 162.)

We view the evidence in the light most favorable to the trial court’s finding. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564-1565; *People v. McGuire* (1993) 14 Cal.App.4th 687, 698.)

Defendant drove recklessly, including against traffic, to accomplish or facilitate one objective—to evade the law enforcement officer. That was his sole intent. There was no evidence defendant had any intent or objective other than to avoid an encounter with police. Therefore, he may be punished only once. (See *People v. Jones* (2012) 54 Cal.4th 350, 355-358, disapproving *People v. Hayes* (1969) 70 Cal.2d 604 [driving with suspended license and while intoxicated could be punished twice].)

We turn to the appropriate remedy on appeal. The Court of Appeal has recently explained: “When section 654 applies, the proper procedure is to impose sentence on both counts and stay execution of sentence on one of the counts. ([*People v.*] *Pearson* [(1986) 42 Cal.3d 351,] 361; *People v. Alford* (2010) 180 Cal.App.4th 1463, 1470-1471.) The stayed sentence becomes permanent upon completion of the sentence on the other count (*People v. Green* (1979) 95 Cal.App.3d 991, 1008.) However, should the conviction on the count for which sentence was imposed be overturned, the sentencing court then merely lifts the stay on the stayed count. (*In re Pope* (2010) 50 Cal.4th 777, 784.)” (*People v. Sanchez* (2016) 245 Cal.App.4th 1409, 1415.) Here, each offense carries the same term—16 months, 2 years or 3 years. (§§ 18, subd. (a); Veh. Code, §§ 2800.2, 2800.4.) Pursuant to section 1170.1, subdivision (a), the trial court imposed a three-year sentence on count 1 and a consecutive one-third the middle term—eight months—on count 2. Consistent with section 654, subdivision (a) the trial court should have imposed a non-consecutive sentence—that is, a low, middle or upper term on each count with the sentence as to one count stayed. (*People v. Jones, supra*, 54 Cal.4th at p. 353; *People v. Duff* (2010) 50 Cal.4th 787, 796.) This is because: “The one-third-the-midterm rule of section 1170.1, subdivision (a), only applies to a consecutive sentence, not a sentence stayed under section 654. . . . Furthermore, the imposition of a ‘consecutive’ and ‘stayed’ sentence would be meaningless because the stayed sentence would only operate if the principal count were eliminated. Therefore, a stayed sentence

cannot be consecutive to a principal term.” (*People v. Cantrell* (2009) 175 Cal.App.4th 1161, 1164; see *In re Pope* (2010) 50 Cal.4th 777, 784, fn. 2.)

We could remand this matter for resentencing and permit the trial court, in its discretion, to sentence defendant to 16 years, 2 years or 3 years on count 2. (§ 18, subd. (a), 1170, subd. (b), Veh. Code, § 2800.4.) However, as noted above, the trial court imposed a three-year term on count 1, which involves essentially the same conduct as count 2. Instead of remanding, therefore, we will exercise our authority to modify the judgment. (§ 1260; *People v. Alford*, *supra*, 180 Cal.App.4th at p. 1473.) We will modify the judgment by imposing a *stayed* three-year term on count 2, consistent with the trial court’s sentence on count 1.

B. Further Sentencing Issues

1. Court operations and facilities assessments

The trial court imposed a \$40 court operations assessment (§ 1465.8, subd. (a)(1)) and a \$30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)). Because defendant was convicted of two felonies, the trial court should have imposed \$80 in court operations assessments and \$60 in court facilities assessments. (*People v. Sencion* (2012) 211 Cal.App.4th 480, 484-485; *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3; see *People v. Alford* (2007) 42 Cal.4th 749, 758, fn. 6.) The judgment must be modified and the abstract of judgment amended to so provide.

2. The “DNA fee”

The trial court also imposed a \$20 “DNA fee,” presumably under Government Code section 76104.6. The abstract of judgment states: “Defendant to pay \$20 DNA fee.” However, no “DNA fee” was authorized. Government Code section 76104.6 mandates a deoxyribonucleic acid penalty “upon every fine, penalty, or forfeiture imposed’ by the trial court. The Government Code penalty does not apply to court operations assessments, court facilities assessments or restitution fines. (§ 1465.8, subd. (b); Gov. Code, §§ 70373, subd. (b), 76104.6, subd. (b)(3).) No fine, penalty or forfeiture was imposed in this case that supported a deoxyribonucleic acid penalty under Government Code section 76104.6. Therefore it was error to impose the \$20 “DNA fee.”

The judgment must be modified and the abstract of judgment amended to omit the “DNA fee.”

IV. DISPOSITION

The judgment is modified as follows: to impose and stay (Pen. Code, § 654, subd. (a)) a three-year sentence on count 2; to impose \$80 in court operations assessments (Pen. Code, § 1465.8, subd. (a)(1)) and \$60 in court facilities assessments (Gov. Code, § 70373, subd. (a)(1)); and to omit the \$20 “DNA fee” (Gov. Code, § 76104.6). In all other respects, the judgment is affirmed. Upon remittitur issuance, the clerk of the superior court is to amend the abstract of judgment to reflect the foregoing and deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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TURNER, P.J.

We concur:

BAKER, J.

RAPHAEL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.